UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:
Michael R. and Sharon D. McKee,
Debtors.

Bky No. 99-33636
Chapter 7 Case

ORDER

I.

This matter came on for hearing on November 4, 1999 on the U.S. Trustee's motion to dismiss for substantial abuse under 11 U.S.C. §707(b). The U.S. Trustee was represented by Michael Fadlovich, and the Debtors were represented by Robert E. Lieske. The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1070-1. This is a core proceeding and the Chapter 7 case is now pending in this Court. The Court, having considered the briefs of the parties, the arguments offered at trial, and being fully advised in the matter, now makes this **ORDER**:

II. Background

The Debtors filed their voluntary petition for Chapter 7 protection on July 20, 1999, showing total monthly income after deductions of $3069 on Schedule I. The Trustee and Debtors now agree that the correct net monthly income is $3961.80 after payroll deductions (excluding Mr. McKee's 401k deduction).[1] The McKees argue that this figure should be reduced by Mr. McKee's $101.56 monthly contribution to a 401k plan, the Trustee objects. Schedule J showed monthly expenses of

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[1]Mrs. McKee's net income is $1599.56 and Mr. McKee's, including the disputed 401k contribution, is $2463.36. It appears from the pleadings that Mr. McKee's monthly contribution to his 401k is 101.56, not the $212 indicated on Schedule I. Apparently the $212 figure included a match from Mr. McKee's employer.

$3375.71, Debtors argue that the correct figure is in fact $3976.71. The Trustee objects to the following expenses and argues that the allowable monthly expenses are only $3275.53:

Education loan for son Seth	$101.18
Car insurance adjustment	$122.00
College expenses for two sons	$478.00

The Debtors have one minor, and two adult sons. Both older sons attend a state university and receive financial assistance from their parents for the nine months of the year they are attending classes full-time. During the summer the college enrolled sons work and pay their own expenses. Budgeted over twelve months the Debtors monthly contribute to their college age sons:[2] $122 in automobile insurance, $403 in car payments for two cars, and $75 for miscellaneous expenses.

The Debtors' Schedule F lists $52,726.32 in unsecured nonpriority debts that appear to be primarily consumer debt. Under the Trustee's analysis the Debtors have sufficient disposable income to fund a Chapter 13 plan paying their unsecured creditors a 50% dividend over 30 months:

Debtors' income after deductions	$4063.36
Mr. McKee's 401k contribution	$ 101.56
Adjusted net income	$3961.80
allowable monthly expenses	$3275.53
Available Income to fund a Chapter 13 plan	$ 686.27

III. Analysis

The Trustee argues that under 11 U.S.C. §707(b) these Debtors have the ability to pay a substantial portion of their dischargeable debt without hardship. In the 8th Circuit "[t]he primary factor

[2]The $600 per month represents 1/12 of the total contributed by the Debtors to their college age sons over a 9 month academic year. The Debtors actually pay out of pocket $170 for car insurance, $541.66 in car payments, and $100 in miscellaneous expenses for each of those 9 months.

that may indicate substantial abuse is the ability of the debtor to repay the debts out of future disposable income." In re Walton, 866 F.2d 981 at 984 (8th Cir. 1989). Although dismissal under this analysis is for "substantial abuse" under 11 U.S.C. §707(b), it does not suggest bad faith or wrongdoing on the part of a debtor. Instead, where a 707(b) motion is filed, a threshold for relief under Chapter 7 is the inability to pay a dividend to unsecured creditors under a hypothetical Chapter 13 plan.

> In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." . . . Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Mathes v. Stuart (In re Mathes), Civil file No. 3-96-906, slip. op. (D. Minn. July 2, 1997), (Citation omitted).

The Trustee argues that voluntary contributions to a 401k plan are not reasonable or necessary expenses for a Debtor seeking bankruptcy protection. Because the Court determines that subsidizing two cars for their college-age sons are not reasonable and necessary expenses, the question concerning the contributions to Mr. McKee's 401k plan is not reached.

Debtors correctly point to the "reasonable and necessary" standard articulated in In re Jones, 55 B.R. 462 (Bankr. D. Minn 1985) to guide the Court in its analysis (under 11 U.S.C. §1325(b)) of whether the Debtors' argued expenses would represent a commitment of all disposable income under a hypothetical Chapter 13 plan.

The Jones court denied confirmation of a Chapter 13 plan where the debtor proposed paying 14% to unsecured creditors, disallowing, among other expenses, a $500 monthly expense for college tuition. Id. at 467. The court noted that "the purpose of chapter 13 is to provide the maximum recovery to creditors while at the same time leaving the debtor sufficient money to pay for his or her

basic living expenses." Id. at 466. This principle also guides the analysis of a Chapter 7 petition in the context of a 707(b) motion.

More recently, in In re Mathes, Judge Kishel of this District observed:

> For a motion like the one at bar, a debtor's educational expenditures are subject to scrutiny, both under the rubric of § 1325(b), In re Jones, 55 B.R. at 467, or in the direct application of § 707(b), In re Gyurci, 95 B.R. 639, 643 (Bankr.D.Minn.1989). In re Mathes, 1996 WL 1055813, (Bankr. D. Minn. 1996).

In In re Mathes the Debtor's Chapter 7 case was dismissed for substantial abuse under 11 U.S.C. §707(b), in part, for his own scheduled college tuition expenses:

> His scheduled expenditure of $375.00 per month for tuition for these courses is not reasonably necessary for his support. This expenditure may not be a luxury, but it simply does not contribute to meeting his current needs for sustenance. This line-entry must be disregarded for the purposes of the analysis, because the statute gives deference to the Debtor's prior obligations to his creditors. Id. at 3.

The McKees argue that expenses related to the support of adult children attending a public university are reasonable and necessary expenses. In re Gonzales, 157 B.R. 604 (Bankr. E.D. Mich. 1993). But the Debtors in Gonzales were proposing a Chapter 13 plan which apparently paid a 28% dividend to unsecured creditors. Id. at 605. Within that context, the court observed that "debtors may continue to assist (i.e. support) a child, who not withstanding having attained majority, has not yet left the nest without forfeiting the opportunity to repay their creditors through chapter 13." Id. at 610. The Michigan court concluded that college expenses for adult children are more non-discretionary than discretionary (Id. at 611), a conclusion incompatible with the holding in In re Mathes. In re Mathes, 1996 WL 1055813, (Bankr. D. Minn. 1996).

Furthermore, the budget of the McKees, although admirable in its commitment to their children,

includes only $75 for direct education related expenses. The other disputed $525 is support related to motor vehicle ownership, hardly a necessary component of a college education. The settled law in this District is that college expenses are not reasonable and necessary expenses.

IV.

Based on the foregoing, It is hereby **ORDERED**:

1) The Debtors may convert this case to one under Chapter 13, but if they elect to do so they shall file all documents required under the Local Rules, including new schedules, statements, and lists, and a plan of debt adjustment, no later than the end of business on November 29, 1999.

2) If the Debtors fails to timely convert this case under Term 1 of this order, the Court thereafter will enter an order of dismissal pursuant to 11 U.S.C. § 707(b).

Dated: November 23, 1999

By the Court:

/e/ Dennis D. O'Brien
Dennis D. O'Brien
Chief U.S. Bankruptcy Judge

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 11/23/99
Patrick G. De Wane, By SKM

14E

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Sandra K. McMackins, hereby certify: That I am the Case Administrator for Chief Judge Dennis D. O'Brien of the United States Bankruptcy Court for the Third Division of the District of Minnesota, at St. Paul, Minnesota; that on November 23, 1999, true and correct copies of the annexed **ORDER** were placed by me in individually stamped official envelopes; that said envelopes were addressed individually to each of the persons, corporations, and firms at their last-known addresses appearing hereinafter; that said envelopes were sealed and on the day aforementioned were placed in the United States mails at St. Paul, Minnesota, to:

U. S. TRUSTEE
1015 U. S. COURTHOUSE
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and this certificate is made by me.

/s/Sandra McMackins

filed On 11/23/99
Patrick G. De Wane, Clerk
By skm , Case Administrator